

NTSB Order No.
EM-102

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 6th day of October, 1983

JAMES S. GRACEY, Commandant, United States Coast Guard,

v.

EDMUND J. SABOWSKI, Appellant.

Docket No. ME-98

ORDER GRANTING MOTION TO DISMISS

The Coast Guard has filed a motion to dismiss appellant's appeal from a decision of the Commandant affirming a three month probated suspension of his mariner's license on a charge of negligence while serving as master of the SS EXXON CHESTER on June 18, 1979. Dismissal is sought on the bases that the notice of appeal was not filed within 10 days after service of the Commandant's decision and that it did not state the grounds for the appeal as required by Sections 825.5(a) and (c) of the Board's Rules of Procedure for Merchant Marine Appeals, 49 CFR Part 825.¹

In opposition to the motion counsel for the appellant contends, among other things, that the 10 day period for filing a notice of appeal is unreasonably, perhaps unconstitutionally, short, and he points out that the Commandant's decision, unlike the decisions of the Coast Guard's own administrative law judges which

¹ 49 CFR 825.5 (a) and (c) provide as follows:
"§825.5 Notice of appeal.

(a) A party may appeal from the Commandant's decision sustaining an order of revocation, suspension, or denial of a license, certificate, document, or register in proceedings described in §825.1, by filing a notice of appeal with the Board within 10 days after service of the Commandant's decision upon the party or his designated attorney. Upon good cause shown, the time for filing may be extended.

* * * * *

(c) The notice of appeal shall state the name of the party, the number of the Commandant's decision, and, in brief, the grounds for the appeal."

provide information on appealing their decisions to the Commandant, contains no advice on either the right to appeal to the Board or on

the shortness of the time for so acting.² Counsel also notes that the Independent Safety Board Act, 49 U.S.C 1903(a) (9) provides no notice of the short period for filing the notice of appeal or that it must specify reasons for the appeal. He urges that the case be decided on the merits rather than on the procedural defect raised by the Coast Guard.

On consideration of the foregoing the Board has decided to grant the Coast Guard's motion to dismiss. Although we do not favor dispositions based on procedural flaws, we believe that (especially where an appellant is represented by counsel) good cause must be shown to justify excusing noncompliance with the rules of practice concerning the initiation of an appeal. Counsel's apparent belief that the time limit for filing the notice of appeal should be longer than 10 days³ and that the Commandant should provide information on the availability of or procedures for further administrative review does not constitute good cause.⁴

ACCORDINGLY, IT IS ORDERED THAT:

1. The Coast Guard's motion to dismiss is granted; and
2. The notice of appeal filed in Docket ME-98 is dismissed.

BURNETT, Chairman, GOLDMAN, Vice Chairman, McADAMS, and BURSLEY, Members of the Board, concurred in the above order. ENGEN

²The notice of appeal, filed 19 days late, stated, by way of explaining the tardiness, that "[w]e had assumed that we had at least 30 days after our receipt of the Vice Commandant's decision to file" the appeal.

³In circumstances where additional time is necessary either to file the notice or to reach a decision as to whether to file an appeal an extension of the period may be obtained for good cause shown. See 49 CFR 825.5(a).

⁴ The Coast Guard's rules pertaining to license suspension proceedings set forth the 10 day requirement for appealing a decision of the Commandant to the Board and also cross reference the applicable Board rules. See 46 CFR 5.30-30. Appellant's counsel presumably had to familiarize himself with those rules for purposes of representing appellant at the evidentiary hearing before the administrative law judge and thereafter on appeal to the Commandant from the law judge's adverse decision.

Member, filed a dissent.

DISSENTING OPINION OF MEMBER ENGEN:

I respectfully dissent from the majority's opinion in this case. As I noted in my joint dissent with Chairman Burnett in Administrator v. Tracy, NTSB Order No. EA-1853, in several cases in the Federal Aviation Administration enforcement action area the Safety Board has stated that it has "followed a consistent policy of preferring to decide a case on the merits rather than on a procedural deficiency." I am troubled in this case because our dismissal of the appeal serves as a punishment to the appellant when it apparently was his lawyer who was at fault, especially since the lawyer was only 19 days late in filing the notice and apparently was under the mistaken impression that the period for filing the notice of appeal was 30 days rather than 10 days. The delay was minimal, there is no claim that it resulted in any prejudice to the Coast Guard, and in my view it does not justify the serious impact on the appellant which will result from our dismissal of the appeal.